IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27-3-2007

Coram

The Honourable Mr.Justice P.SATHASIVAM
and
The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

W.A.Nos.3064 of 2004 and 394 of 2005

A.J.Baskaran ... Appellant in W.A.No.3064/2004 & Respondent in W.A.No.394/2005

Vs.

Tamil Nadu State Transport Corporation,
Villupuram Division-I Limited,
Villupuram, through its Managing Director,
having office at 3/137 Salaimedu, ... Respondentin W.A.No.3064/2004 & Appellant in W.A.No.394/2005
Villupuram.

These writ appeals are preferred under Clause 15 of Letters Patent against the order of this Court dated 13.10.2003 made in W.P.No.15633 of 2001 dated 13.10.2003.
WP NO. 15633/01:- Petition filed under Article 226 of the Constitution of India praying for issue of a writ of certioarified Mandamus calling for the records relating to the letter No. 314/A1/Civil/TNSTC (VPM-DVN-I)/2001 dated 19.05.2001 passed by the respondent and quash the same and thereby directing the respondent to return 10 lakhs (deposit amount) and Rs.3,30,000/- being the Bank quarantee amount forfeited by the respondent with interest from the date of the writ till the date of payment.

For Appellant in W.A.3064/2004 & Respondent in W.A.394/2005 : Mr.R.Krishnamoorthy, Senior Counsel for Mr.P.Murugan

For Respondent in W.A.3064/2004: & Appellant in W.A.394/2005 Mr.T.Chandrasekaran, Special Govt. Pleader

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COMMON JUDGMENT

N. PAUL VASANTHAKUMAR, J.

The writ petitioner in W.P.No.15633 of 2001 has preferred W.A.No.3064 of 2004 against the portion of the order dated 13.10.2001 directing the writ petitioner to pay the licence fee for a period of three months from 24.1.2001 to 24.4.2001.

2. The respondent/Transport Corporation in W.P.No.15633 of 2001 challenged the order of the learned single Judge directing refund of the balance amount, which was forfeited.

3. For the sake of convenience, the parties herein are referred according to their ranks as in the writ petition.

4. The brief facts necessary for disposal of the writ appeals are as follows.

(i) The writ petitioner was the successful bidder in respect of shop No.5 constructed in road side Motel complex in Mamandur, Maduranthakam Taluk. The auction was conducted by the respondent/Transport Corporation and on negotiation, the rental amount was fixed as Rs.1,45,000/- per month. Petitioner deposited Rs.2.50 lakhs on the auction date i.e, on 24.6.2000 and later he deposited Rs.7.40 lakhs and also gave bank guarantee for Rs.3.30 lakhs, apart from paying Rs.10,00,000/- as earnest money deposit. Petitioner was permitted to occupy the shop on 13.11.2000. The shop was used for selling Coffee, Tea, Cool drinks, etc.

(ii) Petitioner commenced his business and initially long route mofussil buses of the respondent Corporation were entering into the bus stand and gradually, the respondent not allowed the long route buses to halt near the said Motel Complex. Since the buses did not halt near the complex and there was very few passenger movement, the petitioner sustained heavy loss and he could not conduct business in the said shop and consequently on 24.1.2001 petitioner gave a notice to the respondent Corporation stating that he will be vacating the shop by giving three months notice. In the notice, petitioner stated the reasons for not continuing his business in shop No.5. Petitioner conducted business in the shop only upto 12.2.2001.

(iii) The General Manager (Technical) of the respondent Corporation inspected the said complex on 10.2.2001 and at that time petitioner informed that since the adjacent Hotel is not functioning, petitioner is incurring heavy loss as no passenger is coming inside the bus stand. The said Officer assured the petitioenr that the hotel will be opened on or before 12.2.2001. Since the Hotel was not opened till 12.2.2001, petitioner closed down his shop No.5 and handed over possession of the shop to the Selection Grade Assistant Manager (Complex in-charge Officer) of the respondent Corporation. A letter of handing over and taking over of shop No.5 was also signed. Thus it is the case of the petitioner that Shop No.5 was handed over on 13.2.2001 and he is not the

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licensee from 13.2.2001.

(iv) However, the Assistant Manager (Civil) of the respondent Corporation sent a letter on 21.4.2001 and directed the petitioner to run the shop for three years from 13.11.2000, failing which the deposit and EMD amount paid by the petitioner would be forfeited. On 30.4.2001, petitioner sent a reply stating that he is not in a position to run the shop for three years and he has already given three months notice to close the shop and handed over possession of the shop on 13.2.2001.

(v) It is also alleged in the affidavit that no agreement was entered into between the petitioner and the respondent and therefore there is no legal document clothing the respondent to compel the petitioner to run the shop for three years, failing which the amount would be forfeited. In spite of the said reply submitted by the petitioner, by order dated 19.5.2001, respondent terminated the licence and also forfeited the earnest money deposit and Bank guarantee. Petitioner was directed to deliver vacant possession of the shop within 24 hours. Petitioner received the said order on 23.5.2001 and sent a reply on 27.5.2001 explained his position.

(vi) Since no reply was received, petitioner challenged the order dated 19.5.2001 by filing W.P.No.15633 of 2001 on the ground that the petitioner has already surrendered possession by handing over the same to the Officer on 13.2.2001 and having taken possession on 13.2.2001 there is no justification on the part of the respondent to claim arrears of licence fee, electricity and water charges for March and April, 2001, giving direction to hand over possession and therefore petitioner is not liable to pay the same as there is no breach of condition of the tender and since the petitioner surrendered possession and gave three months notice on 20.1.2001. Therefore, according to the petitioner, on any event, licence stands terminated on 21.4.2001 and therefore petitioner prayed to quash the order as well as for a direction to return Rs.10,00,000/- (deposit amount) and Rs.3.30 lakhs being bank guarantee forfeited by the respondent with interest.

5. Respondent Transport Corporation filed counter affidavit wherein it is stated that the licence fee was fixed as Rs.1,45,000/- per month for the first year, Rs.1,89,750/- per month with 15% enhanced amount for the second year and Rs.2,18,213/- per month for the third year which is also with 15% enhanced amount over the previous year and the licence fee is payable by the petitioner on or before 5th of every month as per the English Calendar. Further the petitioner is bound to pay electricity and water consumption charges every month within the stipulated period, failing which 25% interest per annum is to be paid and if the electricity consumption charges and water consumption charges for a period of two months is not paid continuously, the respondent Corporation can terminate the licence and forfeit the EMD and security deposit. Petitioner having agreed to abide by the terms and conditions of the auction and tender, he was directed to execute licence agreement and the petitioner remitted the amount as agreed and also enclosed the bank guarantee

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for Rs.3.30 lakhs. It is further stated in the counter affidavit that after accepting the terms and conditions of the tender petitioner had taken over possession on 13.11.2000 and started his business. However, he failed to execute the agreement of licence and by conduct, he agreed to the terms and conditions. The contention of the petitioner that due to closure of the hotel nearby, business of the petitioner shop is dwindled is not correct as shop No.5 is an independent shop granted licence to sell Tea, Coffee, Cool Drinks, etc., and it has no relevance to the hotel business. It is further stated that the Corporation has not issued any instructions not to stop the long route buses inside the bus stand and the buses taking bye-pass route cannot be a ground as the petitioner was not given any promise that a specified number of buses would stop at the motel. It is further stated that the nearby licensed hotel was closed from 25.1.2001 as its agreement was terminated due to default in payment of license fee and other charges. Petitioner was providing fast food for the travelling public to protect and promote his business and even if there was slump in the business, it can be attributed only to the quality of the service rendered by the petitioner, for which the respondent is not responsible. It is also stated in the counter affidavit that the petitioner was not running the shop after 12.2.2001.

6. The learned single Judge after considering the matter in its entirety and taking note of the fact that the petitioner surrendered possession on 13.2.2001 to one of the officers of the respondent and having regard to the fact that as per Clause 28 of the tender document three months notice should be given before cancelling the licence, directed the petitioner to pay three months licence fee from 24.1.2001 i.e, the date on which the petitioner issued the notice, intending to close down the business. It is also held that the respondent is entitled to get licence fee for a period of three months from 24.1.2001 to 24.4.2001 and the petitioner is entitled to get back the balance amount less three months electricity consumption charges and water charges if any.

7. Aggrieved by the direction to pay licence fee, water charges and electricity charges from 24.1.2001 to 24.4.2001, writ petitioner filed W.A.No.3064 of 2004 and as against the direction issued to refund the balance amount, the respondent Corporation has filed W.P.No.394 of 2005.

8. The learned senior Counsel appearing for the writ petitioner argued that the petitioner was given promise at the time of auction that more than 480 buses including long distance buses will halt at the motel and subsequently less than 100 buses actually stopped and therefore the respondent having breached the promise, petitioner sustained heavy loss and consequently on 20.1.2001, petitioner issued notice of termination and the petitioner handed over possession on 13.2.2001 and therefore respondent is not justified in forfeiting the amount of Rs.10,00,000/- and bank guarantee of Rs.3.30 lakhs. The learned counsel also argued that the learned single Judge is not justified

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in directing the petitioner to pay the monthly licence fee and other charges from 21.1.2001 to 21.4.2001 as he is not in actual possession of the shop from 13.2.2001 and did not conduct any business. The learned Senior Counsel also submitted that even though the tender condition Clause 28 empowers the licensor to issue three months notice to the licensee and terminate the licence and to order to vacate the shop, no corresponding clause is made in the tender conditions enabling the licensee to give three months notice to the licensor and surrender possession and the same is arbitrary condition, which the petitioner was compelled to accept at the time when he was given licence as he was not having any bargaining power, except to accept the condition. The learned senior cousnel also submitted that as the possession of the shop was handed over to the Special grade Asssitant Manager on 13.2.2001, the respondents are not justified in demanding any licence fee, water and electricity consumption charges beyond 13.2.2001, and at the most the petitioner can be directed to give three months licence fee as ordered by the learned single Judge and there is no justification on the part of the respondent in not refunding the balance amount. The learned senior counsel also cited the decisions reported in AIR 2004 SC 1484 (Jai Durga Finvest Pvt. Ltd. v. State of Haryana), AIR 1986 SC 1571 (Central Inland Water Transport Corporation Ltd., v. Brojo Nath) and AIR 1993 AP 1 (Krishna & Company v. Government of A.P.) in support of his submissions.

9. The learned counsel appearing for the respondent Corporation contended that the petitioner is bound by the terms and conditions wherein the licensee is not entitled either to hand over the possession prior to expiry of licence period or unilaterally surrender possession and close down the shop. Further due to the said action of the writ petitioner, the travelling public were put to hardship and the respondent Corporation also sustained financial loss and therefore the respondent rightly forfeited the deposit as well as bank guarantee and the direction given by the learned single Judge to refund the amount after adjusting three months licence fee as well as electricity consumption charges and water charges is unsustainable and contrary to the agreed terms and conditions.

10. We have considered the rival submissions made by the learned senior counsel for the writ petitioner as well as the learned Special Government Pleader for the respondent Corporation.

11. The point in issue is whether the respondent is justified in ordering forfeiture of deposit as well as bank guarantee after surrendering the shop by the petitioner on 13.2.2001 and whether the learned Judge is right in giving direction to pay the licence fee from 24.1.2001 to 24.4.2001 with electricty and water consumption charges and directing the respondent Corporation to refund the balance amount to the petitioner.

12. The facts in this case are admitted. Petitioner took licence for three years for agreed rent. The terms and conditions of the the licence empowers the licensor to give three months notice

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and terminate the licence. However, there is no corresponding clause in favour of the licensee to give three months notice and to surrender possession on valid reason. It is not in dispute that the petitioner gave three months notice for termination of licence on 21.1.2001. It is also not disputed that the petitioner surrendered possession of the shop on 13.2.2001 and thereafter petitioner did not conduct business in shop No.5.

13. As rightly contended by the learned senior counsel for the petitioner, respondent having accepted the possession of the shop No.5 on 13.2.2001, is not justified in passing the order of forfeiture of deposits and bank guarantee on the ground that the possession was not handed over to the Managing Director of the Corporation. The original document handing over possession of shop No.5 to the petitioner by the respondent on 13.11.2000 is produced before us and the same is extracted hereunder,

"T.N.S.T.C. (VPM-Dn-I) Motel Complex at Mamandur
SHOP NUMBER - 5
Licencee Name: Thiru A.J.Baskaran,
S/o.Thiru.Anantharajmudliar,
No.73, Pelakuppam road,
Tindivanam.

Handing Over and Taken over document

The following furniture and Electrical fittings with shop number 5 have been handed over to Thiru A.J.Baskaran, licencee of shop number 5 by the Assistant Sel.gr. Asst. Manager (Operation) TNSTC, Mamandur on 13.11.2000.

(1) 1x40w Tube light fitting with bulb - 1 No.
(2) 15" x 12" Hylem sheet meter board with 230v, 5-10 Amp. Im KWH meter, 2 in one 5A Switch socket, 30A kitkat fuse 30A D.P.Switch, All are Anchor in make - 1 No.
(3) 12" x 18" switch board with switch - 1 No.
(4) Energy meter number 1275912 with initial reading 6033 - 1 No.

Handed over By
Sd/-.....13.11.2000
Sel.gr.Asst.Manager
TNSTC Motel Complex
Mamandur."

Taken over by
Sd/-.....
Thiru A.J.Baskaran
S/o.Thiru Anantharajmudaliar

From the perusal of the above document it is clear that the Managing Director has not handed over shop No.5 to the petitioner and only the Selection Grade Assistant Manager has handed over the shop to the petitioner and the petitioner has taken over the same. Handing over of shop No.5 by the petitioner to the Selection Grade Assistant Manager (Operation) is also not in dispute because of the document

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produced before us which reads as under,

"T.N.S.T.C. (VPM-Dn-I) Motel Complex at Mamandur
SHOP NUMBER - 5
Licencee Name: Thiru A.J.Baskaran,
S/o.Thiru.Anantharajmudliar,
No.73, Pelakuppam road,
Tindivanam.

Handing Over and Taken over document

The licencee of shop number 5 has closed the sho number 5 on 12.2.2001. Hence the following furniture and Electrical fittings with shop Number 5 have been taken over from Thiru A.J.Baskaran, licencee of shop number 5 by the Sel.gr.Asst.Manager (Operation) TNSTC, Mamandur on 13.2.2001.

(1) 1x40w Tube light fitting with bulb - 1 No.
(2) 15" x 12" Hylem sheet meter board with 230v, 5-10 Amp. Im KWH meter, 2 in one 5A Switch socket, 30A kitkat fuse 30A D.P.Switch, All are Anchor in make - 1 No.
(3) 12" x 18" switch board with switch - 1 No.
(4) Energy meter number 1275912 with initial reading 6033 - 1 No.

Handed over By
Sd/-.....
Thiru A.J.Baskaran
S/o.Thiru Anantharajmudaliar

Taken over by
Sd/-.....13.2.2001
Sel.gr.Asst.Manager
(Operation)
TNSTC (VPM-DvnI)Ltd
Mamandur - 603111."

Hence it is beyond doubt that the petitioner has rightly handed over possession of the shop to the Selection Grade Assistant Manager (Operation), TNSTC Villupuram Division-I, Mamandur.

14. The circular issued by the respondent dated 12.7.2004 bearing circular No.410 of 2004 clearly states that buses plying through Mamandur to Chennai and Chennai to Mamandur are to be stopped in Motel and if any Driver or Conductor refuse to obey the said direction, action will be taken against them. From the above circular it is clear that buses were not regularly stopped inside the motel at Mamandur and therefore petitioner's claim that due to the non-stopping of the buses, his business was affected and he

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sustained losses pursuant to which he issued notice of termination on 21.1.2001 and unable to bear the loss he closed business from 12.2.2001 is found acceptable.

15. The contention of the respondent that the petitioner is bound by the terms and conditions of the auction, which nowhere states that the petitioner as lessee can hand over possession after giving three months notice is unsustainable because of the Judgment of the Supreme Court reported in AIR 2004 SC 1484 (Jai Durga Finvest Pvt. Ltd. v. State of Haryana), wherein in paragraph 11 the Honourable Supreme Court taking note of the non-consideration of the above aspect by the High Court, after setting aside the same remitted the matter to the High Court for consideration of the matter afresh and find out as to whether the doctrine of frustration will be invoked or not. Paragraph 11 of the judgment reads thus,

> "11. ..... The High Court, as noticed hereinbefore, has merely proceeded on the basis that the appellant had entered into the contract with his eyes wide open; but, the same would not, in our opinion, mean that they were bound to pay the contract amount, get its security amount forfeited, as also pay interest at the rate of 24 per cent, although it could not, by reason of acts of omission and commission on the part of the respondents, carry out the mining operation as per the terms of the agreement."

16. The contention of the learned cousnel for the respondent that the writ petition itself is not maintainable as it involves private contractual right is also unsustainable at this stage because the writ petition was filed by the petitioner in the year 2001 and the same was admitted and an order was passed on merits by the learned single Judge and at the appellate stage it is not open to the respondent to contend that the writ petition is not maintainable, particularly when the facts are not in dispute.

17. As rightly contended by the learned senior counsel for the petitioner, the facts in this case are not in dispute. In AIR 1993 AP 1 (Krishna & Company v. Government of A.P.) a Division Bench of the Andhra Pradesh High Curt considered similar issue and in paragraph 12 held as follows,

> "12. Then the question arises as to the forum, before which it can be agitated. The respondent-Government argues that the question of frustration of contract cannot be gone into in this Writ Petition and that the amount claimed cannot be refunded and that if at all there is any right for the petitioner, the same has to be ventilated through the process of institution of a suit in a civil Court under the common law and this Court cannot entertain such a plea in exercise of its extraordinary jurisdiction under

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Article 226 of the Constitution of India. We are afraid, that we cannot accede to this contention, having regard to the facts and circumstances of this case. It is true, as contended by the learned Government Pleader, that ordinarily when a plea of frustration of contract is raised and consequent refund of amounts is sought for, it is the civil Court which has to entertain the lis having regard to the nature of dispute where the fact finding enquiry is necessary. But, in the instant case, no such fact finding is necessary. The petitioenr is also not claiming any relief for breach of contract so as to say the relief with regard to the breach of contract is purely contractual and that the remedy lies in a civil Court. Here is a case where the auction is held under the statutory rules, a statutory contract has been entered into and the facts leading to the stoppage of work relating to quarrying of sand by the petitioner at the instance of the persons and authority claiming through and on behalf of the Government are admitted and the petitioner is not claiming any damages so as to drive him to Civil Court for determination of the quantum after fulfledged trial. The petitioner is just seeking for refund of the amounts deposited by him after his bid was accepted and having regard to the fact that he was prevented from exercising his rights under the leases and the inaction of the respondents in setting right the matters has frustrated the contract and the respondents had absolutely no right or authority to hold up the said lease amounts aggregating to Rs.39,600/-. The petitioner is also not claiming any interest. As the contract is a statutory one, as the legal right of the petitioner to quarry was invaded by the public and governmental authorities leading to frustration of contract, as the acts leading to frustration of contract are admitted by the respondents, as there is no disputed question arises for determination of the amount claimed inasmuch as the amount claimed is neither by way of damages nor for any breach of contract, we hold that it is not justifiable for this Court to drive the petitioner to seek the common law remedy."

The Honourable Supreme Court in the decision reported in (2006) 2 SCC 269 (L.K.Verma v. HMT Ltd) in paragraph 21 held as follows,

"21. In any event, once a writ petition has been entertained and determined on merit of the

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matter, the appellate court, except in rare cases, would not interfere therewith only on the ground of existence of alternative remedy (See Kanak v. U.P. Avas Evam Vikas Parishad ((2003) 7 SCC 693)). We, therefore, do not see any justification to hold that the High Court wrongly entertained the writ petition filed by the respondent."

Applying the above decision of the Honourable Supreme Court to the facts in this case, we are of the view that the plea raised by the respondent with regard to maintainability of the writ petition at this stage is unsustainable and deserves to be rejected.

18. (a) In the decision reported in AIR 1986 SC 1571 = (1986) 3 SCC 156 (Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly) the Honourable Supreme Court considered the unequal bargaining power and held that unilateral power to terminate is opposed to public policy. In paragraph 90 of the Judgment, the Honourable Supreme Court held thus,

"89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to uphold the Constitution and the laws. The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No

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court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In todays complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

(b) In (1995) 5 SCC 482 (LIC of India v. Consumer Protection & Research Centre) in paragraph 47 the Honourable Supreme Court considered similar issue and held as follows,

"47. It is, therefore, the settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line

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> contract. His option would be either to accept the unreasonable or unfair terms or forego the service for ever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract."

(c) In (2006) 4 SCC 327 (Kerala Samsthana Chethu Thozhilali Union v. State of Kerala) in paragraph 58, the Honourable supreme Court held thus,

> "58. Take it or leave it argument advanced by Mr Chacko is stated to be rejected. The State while parting with its exclusive privilege cannot take recourse to the said doctrine having regard to the equity clause enshrined under Article 14 of the Constitution. The State in its dealings must act fairly and reasonably. The bargaining power of the State does not entitle it to impose any condition it desires."

19. Applying the above referred principles laid down by the Honourable Supreme court and having regard to the admitted facts as narrated above, we are of the view that the order of the respondent in forfeiting the entire deposits and bank guarantee is unsustainable and the order of the learned single Judge in directing the writ petitioner to pay only three months licence fee with electricity charges and water charges from 21.1.2001 to 21.4.2001 with a direction the the respondent corporation to refund the balance amount to the petitioner is legal and valid and no exception could be taken to the said order.

20. In the result, we confirm the order of the learned single Judge dated 13.10.2003 in W.P.No.15633 of 2001 and dismiss both the writ appeals and the respondent Corporation is directed to comply with the order of the learned single Judge within four weeks from the date of receipt of copy of this order. No costs.

Vr

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

The Managing Director, T.N State Transport Corporation,
Villupuram Division-I Limited, 3/137 Salaimedu, Villupuram.

+2ccs to Mr. T. Chandrasekaran, Advocate sr no. 19541, 19542
+1cc to Mr. P. Murugan, Advocate sr no. 19313

GM(CO)
NM(02.04.07)

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